83-1908

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

SHELBY COUNTY)
SHERIFF'S DEPARTMENT,)
)
Petitioner,)
)
-vs-)
)
DEOGRACIAS RUIZ,)
)
Respondent.)

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Where a pro se plaintiff is proceeding on a Pauper's Oath and files an action which on its face indicates that it is barred by the applicable statute of limitations, does the district court have the power to dismiss the action sua sponte before a responsive pleading is filed, and

2. If so, what is the proper standard by which the court of appeals reviews such a dismissal.

3. Is this suit barred by the applicable statute of limitations.

OPINIONS BELOW

The opinion of the court of appeals (Appendix A, infra, 1A-25A) is reported at 725 F.2d 388. The opinions and orders of the district court (Appendix B, infra, 26A-29A, Appendix C, infra, 30A-33A, and Appendix D, infra, 34A-35A) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 1984. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATUTE INVOLVED

42 U.S.C. §2000e-5(f)(1) provides in pertinent part:

> . . . If a charge filed with the Commission . . . is dismissed by the Commission . . . the Attorney General in a case involving a government, govern-

> mental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved . . .

STATEMENT OF THE CASE

Respondent Deogracias Ruiz filed a charge with the Equal Employment Opportunity Commission ("EEOC") on November 18, 1976, alleging that Petitioner Shelby County Sheriff's Department had discriminated against him on the basis of his national origin in his application for a position as deputy sheriff. On February 9, 1979, the EEOC issued a Letter of Determination finding no cause to believe that the allegations in the charge were true. On November 6, 1981, the Justice Department issued to Respondent a Right to Sue Notice as

prescribed by 42 U.S.C. §2000e-5(f)(1). (App. 36A)

Eighty days later, on January 25, 1982, Respondent instituted this action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq., by filing his Right to Sue Notice with the Clerk of the United States District Court for the Western District of Tennessee in Memphis. The district court accepted the notice in order to toll the statute of limitations for filing suits under 42 U.S.C. §2000e-5 (f)(1), but noted that under its local rule, the cause would be dismissed unless a formal complaint were filed within thirty (30) days of filing the notice. (App. 34A) On the same day that he filed his Right to Sue Notice, January 25, 1982, Respondent also filed a Pauper's Oath indicating his finan-

cial inability to employ counsel, to secure the necessary bond, or to pay the costs of litigation. (App. 5A)

Thirty-one days later, on February 25, 1982, Respondent filed a motion requesting the district court to appoint an attorney to represent him in this cause. District Judge Robert M. McRae held that the court was unable to grant the motion as Respondent's filing had failed to meet the February 24, 1982, deadline for filing a formal complaint in the cause. (App. 27A) In dismissing the action sua sponte, the court noted that Respondent had 110 days after issuance of his Right to Sue Notice to search for counsel, and that any extension beyond February 24, 1982, "would disserve the particular purpose of the filing requirement, to protect employers from the burden of defendant (sic)

claims arising from employment decisions that are long past. Delaware State College v. Ricks, 449 U.S. 250 (1980)". (App. 28A)

After the district court denied a timely motion to alter or amend its judgment, Respondent filed a timely notice of appeal and prosecuted his appeal on a Pauper's Oath.

On January 16, 1984, the Sixth Circuit Court of Appeals held that the alleged noncompliance with the statute of limitations is an affirmative defense which must be plead in a formal answer to a formal complaint, and, for that reason, the district court acted improperly in dismissing the action sua sponte before Petitioner filed a formal answer asserting the defense of the statute of limitations. (App. 11A-12A) The Sixth Circuit then reversed and re-

manded the matter "for a determination by the district court under its equitable jurisdiction of whether Ruiz filed his request for counsel within a reasonable time" after the extended filing period expired. (App. 17A and 25A)

REASONS FOR GRANTING THE PETITION

1. A DISTRICT COURT HAS INHERENT POWER TO DISMISS SUA SPONTE A COMPLAINT WHICH ON ITS FACE IS BARRED BY THE STATUTE OF LIMITATIONS.

The Sixth Circuit Court of Appeals held in this case that a district court does not have the power to dismiss a suit which on its face is barred by the applicable statute of limitations, unless the defendant files a formal answer asserting the defense. (App. 11A-12A) The decision conflicts with Link v.

Wabash Railroad Co., 370 U.S. 626 (1962), where this Court acknowledged certain inherent powers of the district courts to dismiss actions sua sponte, including the power to dismiss suits for lack of prosecution, without notice or hearing. In Link, this Court held that "(t)he adequacy of notice and hearing respecting proceedings that may affect a party's rights turns, to a considerable extent, on the knowledge which the circumstances show such party may be taken to have of the consequences of his own conduct." 370 U.S. at 632. With respect to the adequacy of notice and hearing in this case, it should be remembered that when Respondent filed his Right to Sue Letter herein, the court advised him that "unless a formal complaint is filed within thirty (30) days from the date of this filing, this mat-

ter will be dismissed on the Court's own motion without further notice." (Emphasis added) (App. 35A) Surely Respondent cannot contend that he did not have adequate notice of the consequences of his failure to file a formal complaint within 30 days of January 25, 1982.

The Sixth Circuit's holding is also at odds with the Second Circuit's observation in Leonhard v. United States, 633 F.2d 599, 609, n.11 (2nd Cir. 1980), cert. denied 451 U.S. 908 (1981), albeit dictum, that a district court has the power to dismiss a complaint sua sponte "on statute of limitations grounds, at least where, as here, the facts supporting the statute of limitations defense are set forth in the papers plaintiff himself submitted."

In concluding that the district

court lacked the power to dismiss this action sua sponte, the Sixth Circuit relied on Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982), and Mohasco Corp. v. Silver, 447 U.S. 807 (1980). Zipes established that the filing periods under Title VII of the Civil Rights Act of 1964 are not jurisdictional prerequisites to suit but are requirements that are subject to waiver, estoppel, and equitable tolling. 455 U.S. at 393. Nothing, however, in Zipes either (1) requires a formal answer asserting a defense based on the statute of limitations or (2) deprives a district court of the power to dismiss an action sua sponte when the suit papers clearly indicate that the action is time-barred. The only language in Zipes which arguably supports the Sixth Circuit's decision in this case is the

following observation regarding Mohasco which the Sixth Circuit incorporated in its decision:

> . . .we did not sua sponte dismiss the action in Mohasco Corp. v. Silver, 447 U.S. 807 (1980), on the basis that the District Court lacked jurisdiction because of plaintiff's failure to comply with a related Title VII time provision. Instead, we merely observed in a footnote that "(p)etitioner did not assert respondent's failure to file the action within 90 days as a defense." Id., at 811, n.9. 455 U.S. at 398.
>
> See App. 10A-11A.

Because the foregoing observation in footnote 9[1] to Mohasco was dictum

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[1] A review of the actual Petition for a Writ of Certiorari in Mohasco Corporation v. Ralph H. Silver, No. 79-616, reveals that the EEOC mailed Silver's right to sue notice to him on August 24, 1977. On November 23, 1977, 91 days after the notice was mailed to Silver, he filed his complaint with the United States District Court for the Northern District of New York. Because the 90 day filing period began to run on the date it was mailed to him [see Plunkett

unnecessary to the decision in that case, it is not controlling in this case in which the power of the district courts to dismiss actions sua sponte is directly placed in issue. See McDaniel v. Sanchez, 452 U.S. 130, 141 (1981).

By misinterpreting the scope of Zipes and Mohasco, the Sixth Circuit has not only limited the district courts' powers to manage their own affairs, it has imposed an additional fact finding requirement on the already overburdened federal trial courts.

Petitioner submits that (1) because the Sixth Circuit misinterpreted Zipes

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v. Roadway Express, Inc., 504 F.2d 417 (10th Cir. 1974), and Russell v. American Tobacco Co., 528 F.2d 357, 365[14] (4th Cir. 1975), cert. denied 425 U.S. 935 (1976)], it is safe to presume that Silver filed his suit within 90 days after he received his right to sue notice.

and Mohasco as precluding the district court's sua sponte dismissal of this action, (2) because the Sixth Circuit's requirement of a formal answer asserting the defense of the statute of limitations exalts form over substance and improperly limits the inherent powers of the district courts, and (3) because the decision conflicts with Link and Leonhard, this Court should exercise its supervisory power to review the important issues presented in this Petition.

2. BY IGNORING UNCONTROVERTED FACTS IN THE RECORD WHICH SUPPORT THE DISTRICT COURT'S DISMISSAL OF THIS ACTION, AND BY FAILING TO APPLY AN "ABUSE OF DISCRETION" STANDARD OF REVIEW, THE COURT OF APPEALS ERRED IN REVERSING AND REMANDING THIS MATTER FOR RECONSIDERATION BY THE DISTRICT COURT.

In Link v. Wabash Railroad Co., supra, this Court held that when a court of appeals reviews a district court's sua sponte dismissal of an action, the issue is whether the dismissal was within the permissible range of the court's discretion, not whether the district court had the power to take the action. 370 U.S. at 633. The same reasoning should apply in cases where, as here, the district court dismisses an action because it is barred by the applicable statute of limitations. There are ample facts to support the district court's dismissal of this case.[2]

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[2] In his motion to alter or amend the judgment of dismissal, Respondent did not assert any facts which would justify a further equitable tolling of the statutory filing period. Neither did Respondent contend that Petitioner had waived, or should be estopped from raising, the statute of limitations as a defense to his action. Before the district court ruled on Respondent's

The Sixth Circuit, however, did not review the facts to determine whether they support the district court's decision. On the contrary, it speculated that the facts might justify an equitable tolling of the statute of limitations. (App. 17A-23A) In failing to review the record to determine whether the district court abused its discretion in dis-

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motion, Petitioner filed a response containing certain undisputed facts which established that Respondent had slept on his rights. The Sixth Circuit ignored many of the undisputed facts but did acknowledge the following in its decision: On November 18, 1976, Respondent filed his charge with the EEOC. On February 9, 1979, the EEOC sent him a letter finding no cause to believe that the allegations in his charge were true. On November 6, 1981, Respondent was issued a right to sue letter (App. 3A). On February 25, 1982, 63 months after he filed his EEOC charge, Respondent formally requested the district court to appoint an attorney to represent him (App. 6A). Neither Respondent nor the EEOC, as amicus curiae in the district court and the Sixth Circuit, attempted to counter Petitioner's contention that Respondent had slept on his rights.

missing this case, the Sixth Circuit committed legal error.

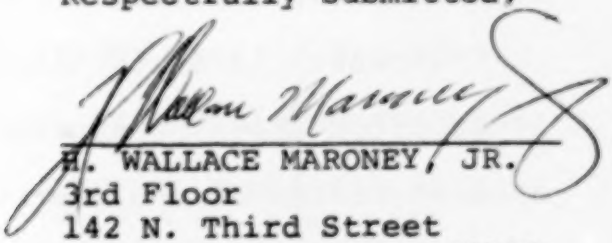
Because the Sixth Circuit improperly departed from the appropriate standard of review of the district court's dismissal, and because its decision has imposed an additional and unnecessary fact finding requirement on the district courts in the Sixth Circuit, this Court should exercise its supervisory power to correct the erroneous legal principles established by the Sixth Circuit in its decision.

CONCLUSION

For the reasons stated, Petitioner respectfully submits that this Court should issue a writ of certiorari to review the decision of the Sixth Cir-

cuit Court of Appeals.

Respectfully submitted,



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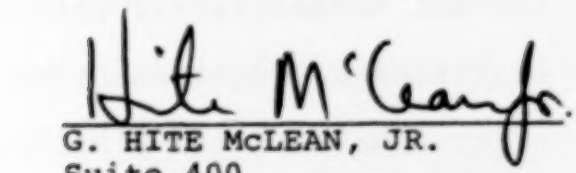

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DEOGRACIAS RUIZ,	)	
	)	
Plaintiff-Respondent,	)	
	)	
-vs-	)	NO. 82-5456
	)	
SHELBY COUNTY	)	
SHERIFF'S DEPARTMENT,	)	
	)	
Defendant-Appellee.	)	

On Appeal from the United States District Court for the Western District of Tennessee, at Memphis. Honorable Robert M. McRae, District Judge.

Decided and Filed: January 16, 1984.

Before KENNEDY and WELLFORD, Circuit Judges, and WEICK, Senior Circuit Judge.

WEICK, SENIOR CIRCUIT JUDGE:

Appellant Deogracias Ruiz (Ruiz) appeals from an order entered by the United States District Court for the Western District of Tennessee, Western Division, resulting in the dismissal of the Title VII employment discrimination action of Ruiz against the Shelby County Sheriff's Department, Appellee. The District Judge based his order on 42 U.S.C. §2000e-5(f)(1), which says in part as follows:

> (f)(1)...If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge...the Commission has not filed a civil action...or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission...shall so notify the person aggrieved and within ninety days after the giving of such notice a civil

> action may be brought...by the person claiming to be aggrieved. [1]

I.

On November 18, 1976, Ruiz filed a charge with the Equal Employment Opportunity Commission (EEOC), alleging that the appellee had discriminated against him on the basis of his national origin in his application for a position as deputy sheriff with Shelby County. On February 9, 1979, the EEOC issued a Letter of Determination finding no cause to believe that the allegations in the charge were true. On November 6, 1981, the EEOC issued to Ruiz a "Notice of Right to Sue within 90 Days," as pre-

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[1] 42 U.S.C. §2000e-5(e) originally allowed only thirty days after the receipt of notice to bring civil action, but was subsequently redesignated as 42 U.S.C. §2000e-5(f)(1) and amended to provide, among other things, for the current ninety day period. Pub. L. No. 92-261, §4(a), 86 Stat. 104 (1972).

scribed by 42 U.S.C. §2000e-5(f)(1), supra.

Eighty days later, on January 25, 1982, Ruiz instituted this cause of action under 42 U.S.C. §2000e by filing his Notice of Right to Sue with the Clerk's Office, United States District Court for the Western District of Tennessee, Western Division, in Memphis. The district court accepted this notice in order to toll the statute of limitations for filing suits under 42 U.S.C. §2000e-5(f)(1), but noted that under its local rule the cause would be dismissed unless a formal complaint was filed within thirty (30) days of filing the notice. See Beckum v. Tennessee Hotel, 341 F. Supp. 991 (W.D. Tenn. 1971)

(Wellford, J.).[2]

On the same day that Ruiz filed his right to sue notice, January 25, 1982, he also filed a Pauper's Oath indicating his financial inability to employ counsel, to secure the necessary bond, or to pay the costs of litigation. The oath was approved by an order of the court that "the letter from the P.O. Order be filed and treated as a complaint on a Pauper's Oath, and for the time being, it be shown that the suit be prosecuted Pro Se in that [Ruiz] is

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[2] When Ruiz filed his Notice of Right to Sue, the Clerk's Office completed a "Notice of Filing Administrative Right to Sue Letter." In addition to noting that the case would be dismissed unless a formal complaint was filed within thirty (30) days, the form also indicated that "[t]he Right to Sue Notice was filed in lieu of a formal complaint because the statutory period for filing was about to expire and the Complainant has been unable to employ counsel." (Emphasis added).

representing himself." The record indicates that on January 25, 1982, the Clerk's Office forwarded to the appellee by certified mail a copy of the Ruiz Pauper's Oath. Apparently Ruiz then went out to seek counsel prior to filing a motion for the district court to appoint counsel.

On February 25, 1982, Ruiz filed a "Motion of Request the Right to Sue," wherein he requested that the district court appoint counsel to represent him in this cause. District Judge Robert M. McRae, however, held that the court was unable to grant this motion as Ruiz's filing had failed to meet the February 24, 1982, deadline for filing a formal complaint in the cause. In dismissing the complaint of Ruiz, the court noted that Ruiz had 110 days after issuance of his Notice of Right to Sue to search for

counsel, and that any extension beyond February 24, 1982, "would disserve the particular purpose of the filing requirement, to protect employers from the burden of defendant claims arising from employment decisions that are long past. Delaware State College v. Ricks, 449 U.S. 250 (1980)."

On March 29, 1982, Ruiz filed a motion to alter or amend the district court's dismissal of his cause. As bases for the motion, Ruiz cited his financial difficulty in hiring an attorney and the likelihood that he would prevail on the merits should the action go to trial. Ruiz also filed an affidavit listing those attorneys who declined to represent him, and their reasons for so declining. On April 6, 1982, Ruiz also filed another affidavit explaining that he thought thirty days

from January 25, 1982, fell on February 26, 1982, the day after Ruiz had requested counsel. In its order denying this motion, the district court noted that Ruiz "ha[d] made serious yet unsuccessful efforts to secure counsel to represent him in this cause," but did not address the mistake alleged in the April 6 affidavit, and then basically repeated its earlier rationale for dismissing the case under 42 U.S.C. §2000e-5(f)(1).

II.

On appeal, intervenor EEOC charges vigorously that the district court's action was the equivalent of an involuntary dismissal of the case under F.R.Civ.P. 41(b) "for failure of a plaintiff to prosecute or to comply with [the Civil Rules] or any other order of the court." The EEOC then argues that

such involuntary dismissal is an overly harsh sanction where this pro se Title VII plaintiff merely filed a single document one day late, and otherwise has not engaged in a clear pattern of delay or contumacious conduct. The appellee responds that the district court's action was not an involuntary dismissal under Rule 41(b), but a proper sua sponte dismissal based on the appellant's failure to commence a civil action within the statute of limitations, which was extended gratuitously by the district court. The appellee also raises the equitable defense of laches as a further reason for this court to affirm the dismissal by the district court.

A.

In Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982), the

Supreme Court held that compliance with 42 U.S.C. §2000e-5(d), which required charges to be filed with the EEOC within 90 days of the alleged unlawful employment practice (now amended to extend the time limit to 180 days, and codified as §2000e-5(e)), is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling. The Court stated that in construing the provisions of Title VII, "a technical reading would be 'particularly inappropriate in a statutory scheme in which laymen, unassisted by trained lawyers, inititate the process.'" 455 U.S. at 397, citing Love v. Pullman Co., 404 U.S. 522, 527 (1972).

Additionally, in Zipes the Supreme Court noted that it did not sua sponte

dismiss the action in Mohasco Corp. v. Silver, 447 U.S. 807 (1980), on the basis that the District Court lacked jurisdiction because of plaintiff's failure to comply with what we presume to be 42 U.S.C. §2000e-5(f)(1); instead, in Mohasco, the Court merely observed in a footnote that petitioner had failed to assert respondent's failure to file the action within 90 days as a defense. 455 U.S. at 398, citing 447 U.S. at 811, n.9.

Therefore, at the outset, we hold that an alleged failure to comply with the 90 day filing period under 42 U.S.C. §2000e-5(f)(1) is an affirmative defense which is properly plead in an answer to the complaint. See F.R.Civ.P. 8(c). Because the district court dismissed the case prior to the filing of a formal complaint by Ruiz and an answer to the

complaint by the appellee, we further hold that dismissal of Ruiz's cause by the district court sua sponte was improper in this case.[3]

In light of this holding, we treat the district court's denial of Ruiz's request for counsel as an election by the district court to not exercise its equitable jurisdiction to extend the

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[3] In its "Notice of Filing Administrative Right to Sue Letter," the District Court clearly indicated that filing the notice served to toll the statutory period, and that Ruiz was still required to file a formal complaint. F.R.Civ.P. 8(a) requires that a complaint contain a jurisdictional statement, a claim for relief, and a demand for judgment. To the extent that the Notice of the Right to Sue is deficient in these respects, its filing cannot constitute the filing of a complaint sufficient to commence a civil action under F.R.Civ.P. 3. To the contrary see Huston v. General Motors Corp., 477 F.2d 1003, 1008 (8th Cir. 1973). Therefore, the district court's dismissal cannot be construed as an involuntary dismissal of an action under F.R.Civ.P. 41(b).

period in which Ruiz could request counsel. We now address whether such an election was required in the instant case. We approach this issue

> with consciousness of the constitutional principles underlying the Equal Employment Opportunity Act and with the desire to interpret its provisions so as fully to serve the great purposes enunciated by Congress.

In this regard, the Fifth Circuit's language...is appropriate:

> "The basic purposes of the Act, however, are clearly discernible. Mindful of the remedial and humanitarian underpinnings of Title VII and of the crucial role played by the private litigant in the statutory scheme, courts construing Title VII have been extremely reluctant to allow procedural technicalities to bar claims brought under the Act...." Sanchez v. Standard Brands, Inc., 431 F.2d 455, 460-61 (5th Cir. 1970).

Harris v. Walgreen's Distribution Center, 456 F.2d 588, 591 (6th Cir. 1972).

In Harris, the appellant filed a motion for appointment of counsel within the thirty day period prescribed by the statute for filing a Title VII action.[4] The district court denied the motion. The appellant then filed an "Amended Petition", again seeking appointment of counsel, but reciting his cause of action in more detail. The district judge dismissed the "Amended Petition," again denying appointment of counsel, but adding as a rationale for dismissal that the amended petition had not been filed within the prescribed 30 day period.

On appeal, this court reversed. The court held on equitable grounds that the original motion for counsel "should be regarded as tolling the statute until

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[4] See note 1, supra.

it was disposed of." 456 F.2d at 592. The court distinguished Goodman v. City Products Corp., 425 F.2d 702 (6th Cir. 1970), in which the Sixth Circuit affirmed the district court's dismissal of the Title VII action when there was "no allegation or showing in the record of circumstances justifying a tolling of the statute on recognized equitable principles." 425 F.2d at 704. Furthermore, the court held that

> when after decision on the motion for counsel the time remaining is unreasonably short for securing a lawyer and filing a complaint, the District Judge's order granting or denying the motion for appointment of counsel should set a reasonable time. Normally we would expect the statutory period of 30 days to be employed as a guide in this regard.

Harris, 456 F.2d at 592. Thus, the equitable "extension of time" under Harris entails not only an initial tolling of the statute to deal with the

plaintiff's need for counsel, but also an additional reasonable time beyond the statutory period for filing the complaint.

Consistent with this circuit's decision in Harris, some courts, including the District Court for the Western District of Tennessee, Western Division, have extended Harris to accept plaintiff's Notice of Right to Sue and/or request for appointment of counsel as a complaint sufficient to equitably toll the statutory period. See (then District) Judge Wellford's opinion in Beckum v. Tennessee Hotel, supra. See also Hawkins v. International Harvester, 461 F.Supp. 588, 591 (W.D. Tenn. 1978) and cases cited therein.

B.

Consistent with Harris, the District Court in this case granted Ruiz an

equitable tolling of the statutory period. Therefore, in reversing the district court's dismissal of the case, we hold that on equitable grounds, the case should be remanded for a determination by the District Court under its equitable jurisdiction of whether Ruiz filed his request for counsel within "a reasonable time" under Harris, notwithstanding his failure to file his request until 31 days after the filing of his right to sue notice and pauper's oath. In so holding, we discuss some of the unusual facts of this case which compel our decision.

As previously noted, Ruiz filed both his right to sue notice and pauper's oath on January 25, 1982, eighty days after receipt of the notice and well within the 90 day statutory period prescribed by 42 U.S.C. §2000e-5(f)(1).

Ruiz then went out again to seek counsel to assist in his filing of the formal complaint, as he apparently had done prior to filing his right to sue notice, and when unsuccessful in his search, filed a motion requesting counsel within what he thought to be the prescribed 30 day period. In its order denying the motion of Ruiz to alter or amend judgment, the District Court noted that Ruiz had made "serious yet unsuccessful efforts to secure counsel," but then stated that "[a]lthough it appears that Ruiz knew from his May and June efforts of his difficulty in securing counsel, he did not file a motion requesting the appointment of counsel within the extensive 110 day filing period." Yet both the "Notice of Filing Administrative Right to Sue Letter" completed by the Clerk's Office, and the Pauper's Oath

sworn by appellant on January 25, 1982, clearly indicated that he was unable to employ counsel. It is not surprising that Ruiz, who could not afford counsel and who had been previously unsuccessful in securing counsel, again did so fail to secure counsel. To the extent that the delay of Ruiz in filing his request for appointment of counsel was at least in part caused by the District Court's failure to determine that Ruiz did not intend to prosecute the case pro se and needed to have counsel appointed, this factor may be considered by the District Court in determining whether Ruiz filed his request within a reasonable time under Harris, such that the court could equitably extend the tolling period to request counsel

from thirty to thirty-one days.[5]

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[5] We note that other cases which addressed less than formal complaints involved a formal "Application for Appointment of Counsel and Authorization to Commence Suit Without Prepayment of Fees, Costs, or Security." See, e.g., Rice v. Chrysler Corp., 327 F.Supp. 80, 82 (E.D. Mich. 1971). We approve of such an application, which would enable the district court to resolve concurrently the complainant's need for counsel and his inability to pay for the costs of the suit, and would be consistent with the Congressional provision within 42 U.S.C. §2000e-5(f)(1) that "[u]pon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security."

A procedure whereby a claimant unable to afford an attorney or the costs of litigation still goes out to seek counsel will, if the appointment of counsel is otherwise appropriate, result only in delay of the filing of a formal complaint and in the ultimate resolution of the case. See Hawkins, supra, 461 F.Supp. at 591 (important concern in Title VII cases is time in which plaintiff eventually files formal complaint). We do not intend to imply by our action in this case, however, an automatic right to the appointment of counsel for

Several other factors merit brief discussion by this court. First, we note that in the affidavit in support of his motion to alter or amend judgment submitted April 6, 1982, Ruiz has alleged confusion about the exact day which 30 days after January 25, 1982, would fall on, thus indicating that his request for counsel on February 25, 1982, was a good faith attempt to comply with the District Court's tolling period. The District Court gave no consideration to this allegation in its order denying appellant's motion to alter or amend judgment. "District courts should be sensitive to the problems faced by pro se litigants and

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all Title VII plaintiffs who cannot afford but request counsel's appointment. See Caston v. Sears, Roebuck & Co., 556 F.2d 1305, 1309 (5th Cir. 1977) (no such automatic right).

innovative in their responses to them." Caston v. Sears, Roebuck & Co., 556 F.2d at 1310.

Second, we note that because the Clerk's Office mailed a copy of the pauper's oath of Ruiz to the appellee by certified mail, the appellee had definite notice of Ruiz's potential suit within the prescribed 90 day period. See Beckum, 341 F.Supp. at 993, in which Judge Wellford in part based his acceptance of preliminary papers on the fact that defendant Tennessee Hotel had been put on notice.

Finally, we note that Ruiz filed his right to sue notice with the clerk's office eighty days after receipt, so that when this period was combined with the district court's thirty day tolling of the statute, the appellant had 110 days to request coun-

sel. It is true that appellant did not do so until the 111th day. Yet if the appellant had waited until the 90th day to file his notice, the period allowed by 42 U.S.C. § 2000e-5(f)(1), then in light of the 30 day tolling of the statute, Ruiz rightfully would have had 120 days to file his request. The appellee has not alleged any prejudice directly arising from the one day delay of Ruiz. Nor could we imagine prejudice arising from such delay, especially in light of the fact that if Ruiz had waited 90 days to file his notice, the Western District of Tennessee could have given him a total of 120 days to request the appointment of counsel. See Harris, supra, 456 F.2d at 592.

C.

Laches is an equitable doctrine which bars an action where a party's

unexcused or unreasonable delay has prejudiced his adversary. U.S. v. Weintraub, 613 F.2d 612, 619 (6th Cir. 1979), cert. denied, 447 U.S. 905 (1980). The affirmative defense of laches is properly plead in an answer to the complaint. F.R.Civ.P. 8(c). Because the district court dismissed the case prior to the filing of a formal complaint by Ruiz and an answer to the complaint by the appellee, the appellee's contention that this suit should be barred by laches is raised for the first time with this court. However, appellee's argument would only properly be raised here after the filing of a formal complaint and answer, and after consideration of the merits of the defense by the district court. Therefore, we specifically do not decide either that laches can be used as a defense to

a Title VII action brought by a private plaintiff, or that laches is appropriate in this particular case. Cf. Boone v. Mechanical Specialties Co., 609 F.2d 956, 960 (9th Cir. 1979) (laches as defense in Title VII is an exception rather than rule).

The dismissal by the District Court is REVERSED, and the case is REMANDED for a determination by the District Court under its equitable jurisdiction of whether the appellant filed his request for counsel within "a reasonable time" under Harris.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

DEOGRACIAS RUIZ,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	NO. 82-2053-M
	)	
SHELBY COUNTY	)	
SHERIFF'S DEPARTMENT,	)	
	)	
Defendant.	)	

ORDER OF DISMISSAL
(filed March 15, 1982)

Plaintiff instituted this employment discrimination action on January 25, 1982, under 42 U.S.C. §2000e by filing a Notice of Filing Administrative Right to Sue Letter. The Court accepted this notice in order to toll the statute of limitations for filing suit in this Court, but noted that this case would be dismissed unless a formal complaint were

filing.

On February 25, 1982, plaintiff filed a Motion of Request the Right to Sue, wherein he requested that the Court appoint counsel to represent him in this cause. The Court is unable to grant this motion as plaintiff's filing failed to meet the February 24, 1982, deadline for filing a formal complaint in this cause.

Under 42 U.S.C. §2000e-5(f)(1), plaintiff had 90 days after his Notice of Right to Sue was issued on November 6, 1981, in which to file a complaint based on his administrative charge. By filing this notice with the Clerk of this Court on January 25, 1982, the 80th day of the period, plaintiff was granted 30 days beyond that date -- until February 24, 1982 -- during which to file a formal complaint. Plaintiff

thus had a total of 110 days after issuance of his Notice of Right to Sue in which to search for counsel to represent him. While the Court is sympathetic with plaintiff's difficulty in securing counsel, a failure to adhere to the extended filing deadline of February 24, 1982, would disserve the particular purpose of the filing requirement, to protect employers from the burden of defendant (sic) claims arising from employment decisions that are long past. Delaware State College v. Ricks, 449 U.S. 250 (1980).

In light of plaintiff's failure to file a formal complaint or a request for appointment of counsel during this extended period, the instant motion must be denied, and this cause is hereby dismissed.

IT IS SO ORDERED.

ENTER: This 15th day of March 1982.

/s/ Robert M. McRae, Jr.
ROBERT M. McRAE, JR., JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

DEOGRACIAS RUIZ,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	NO. 82-2053-M
	)	
SHELBY COUNTY SHERIFF'S DEPARTMENT,	)	
	)	
Defendant.	)	

ORDER DENYING MOTION TO ALTER OR AMEND JUDGMENT

(filed July 13, 1982)

This Court dismissed this employment discrimination action by order of March 15, 1982, because of plaintiff's failure to meet the extended deadline for filing a formal complaint in this cause. Judgment was entered for defendant on March 18, 1982, by the Clerk of this Court.

On March 29, 1982, Plaintiff filed a motion to alter or amend this judg-

ment. As bases for this motion, plaintiff cites his financial difficulty in hiring an attorney and the likelihood that he will prevail on the merits should this action be allowed to go to trial. Movant also has filed an affidavit which lists three attorneys who have declined to represent him.

While it appears that plaintiff has made serious yet unsuccessful efforts to secure counsel to represent him in this cause, this cannot justify a grant of the relief sought herein. Under 42 U.S.C. §2000e 5 (f)(1), plaintiff had 90 days from the issuance of his Notice of Right to Sue in which to file a complaint based on his administrative charge of employment discrimination. Upon filing his Notice of Right to Sue 10 days before the running of this statute of limitations,

plaintiff was allowed a 20-day grace period beyond the original tolling date in which to file a formal complaint. Although it appears that plaintiff knew from his May and June efforts of his difficulty in securing counsel, he did not file a motion requesting the appointment of counsel within the extensive 110 day filing period. Neither has he alleged any circumstances -- extraordinary or otherwise -- for missing this deadline. A failure to adhere to this extended filing deadline therefore would unduly disserve the particular purpose of the filing requirement, to protect employers from the burden of defending claims arising from employment decisions that are long past. Delaware State College v. Ricks, 449 U.S. 250 (1980).

For the foregoing reasons, the instant motion to alter or amend the judgment for defendant in this cause must be denied.

ENTER by Order of Robert M. McRae, Jr., U.S. District Judge, this 13th day of July 1982.

/s/ J. Franklin Reid
J. FRANKLIN REID, CLERK

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

DEOGRACIAS RUIZ 2573 Faxon Ave. Memphis, TN 38122	)	
Plaintiff	)	
-vs-	)	CIVIL NO. 82-2053-M
SHELBY COUNTY SHERIFF'S DEPT.	)	
Defendant	)	

NOTICE OF FILING ADMINISTRATIVE RIGHT TO SUE LETTER
(filed January 25, 1982)

On 25 January, 1982, the Court accepted for filing a Notice of Right to Sue issued to Deogracias Ruiz by EEOC.

The Right to Sue Notice was filed in lieu of a formal complaint because the statutory period for filing was about to expire and the Complainant has been unable to employ counsel. The filing of the Right to Sue Notice may

toll the running of the limitation on filing suit in this Court; however, unless a formal complaint is filed within thirty (30) days from the date of this filing, this matter will be dismissed on the Court's own motion without further notice.

J. Franklin Reid, Clerk

by /s/ Cynthia L. Fulton
Deputy Clerk

APPENDIX E

U. S. DEPARTMENT OF JUSTICE

NOTICE OF RIGHT TO SUE
WITHIN 90 DAYS

WBR:HAG:tbg

Washington, D.C. 20530

November 6, 1981

CERTIFIED MAIL

Mr. Deogracias Ruiz
2573 Faxon Avenue
Memphis, Tennessee 38112

RE: EEOC Charge against Shelby County Sheriff's Department
No. 043770175

Dear Mr. Ruiz:

Because the above charge you filed with the Equal Employment Opportunity Commission has been dismissed, you are hereby notified that you have the right to institute a civil action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e, et seq., against the above-named respondent.

If you choose to commence a civil action, such suit must be filed in the appropriate United States District Court within 90 days of your receipt of this Notice. If you are unable to retain an attorney, the Court is authorized in its discretion to appoint an attorney to represent you and to authorize commencement of the suit without payment of fees, costs, or security. In order to apply for an appointed attorney, you should, well before the expiration of the above 90-day period, take this Notice, along with any correspondence you have received from the Justice Department or the Equal Employment Opportunity Commission, to the Clerk of the United States District Court in Memphis. (Emphasis in original)

The investigative file pertaining to your case is located in the EEOC

District Office, 1401 Union Avenue, Suite 502, Memphis, Tennessee 38104.

This Notice should not be taken to mean that the Department of Justice has made a judgment as to whether or not your charge is meritorious.

Sincerely,

Wm. Bradford Reynolds
Assistant Attorney General
Civil Rights Division

By: /s/ Herbert A. Goldsmith, Jr.
Herbert A. Goldsmith, Jr.
Attorney
Federal Enforcement Section

cc: EEOC District Office

(Filed with the United States District Court on January 25, 1982)